

Form A

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

EXCLUSIONARY PROVISIONS AND ASSOCIATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of Applicant:
(Refer to direction 2)

A91290 NBN Co Limited (**NBN Co**)

- (b) Description of business carried on by applicant:
(Refer to direction 3)

NBN Co will design, build and operate a national broadband network (**NBN**) to provide access to high speed broadband to all Australian premises. Its role is to build an integrated national broadband network providing fibre to 93 per cent of premises and wireless and satellite to the remaining seven per cent.

- (c) Address in Australia for service of documents on the applicant:
Level 11, 100 Arthur Street, North Sydney NSW 2060.

2. Contract, arrangement or understanding

- (a) Description of the contract, arrangement or understanding, whether proposed or actual, for which authorisation is sought:
(Refer to direction 4)

Authorisation is sought for certain provisions and a proposed amended provision of the Agreement between NBN Co Limited and SingTel Optus Pty Ltd and other Optus entities (**Optus**) to migrate Optus' subscribers to the NBN (**Agreement**) dated 23 June 2011.

The relevant provisions for which authorisation is sought are described at item 2(b) below.

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, exclusionary provisions and (if applicable) are, or would or might be, cartel provisions:
(Refer to direction 4)

The Optus HFC Agreement contains clauses which provide for:

- Optus to progressively migrate HFC customers to the NBN as it is rolled out [clause 9.2];
- a fixed line network preference in favour of the NBN for residential and small business customers served by Optus' HFC network (which will operate for a period of 15 years from the date the NBN is first available in an HFC serving area) [clause 5.2(a)];
- progressive payments by NBN Co to Optus based on the actual number of customers that migrate from its HFC network to the NBN. NBN Co will make payments to Optus based on the number of subscribers who are migrated to the NBN from Optus' HFC network by any RSP, not merely those subscribers who remain customers of Optus after they migrate to the NBN from Optus' HFC network [clause 11.1(a)]; and
- once migration is completed, the decommissioning by Optus of the non-optic fibre parts of the HFC network that do not provide ongoing support for mobile infrastructure and business customers [clauses 10.1, 10.2, 10.3].

To support these provisions, the Optus HFC Agreement also contains clauses which provide that Optus must not further extend the coverage of the HFC Network or grant any right or interest or permit any person to use, operate or provide any service over or using the HFC Network in an HFC Serving Area after deactivation and must ensure that no person can use the HFC Network to provide services in Australia [clauses 10.2(b);(c);(d)].

It also contains limits on the disposal of the HFC Network [clause 10.4].

It also contains a provision which preserves Optus' continued supply of HFC services to HFC subscribers until migration of those HFC subscribers in the ordinary and usual course consistent with its usual business practices, including that Optus will not proactively by way of a direct marketing campaign seek to obtain subscribers that will only use the HFC Network for voice services [clause 4.3(a)].

It will also contain a provision that provides that for a period of 15 years after the execution date of the Optus HFC Agreement, Optus may not conduct a marketing campaign in respect of wireless data services targeted at retail customers whose premises are within the HFC serving area which is expressly critical of or makes any express adverse statement about the performance or functionality of the NBN where such criticism or statement is, in all the circumstances, misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the Australian Consumer Law or involves the making of a false or misleading representation in contravention of section 29 of the Australian Consumer Law (**anti-disparagement provision**) [proposed amended clause 5.2(c)].

Please refer further to the NBN Co and Optus submissions.

- (c) Description of the goods or services to which the contract, arrangement or understanding (whether proposed or actual) relate:

The services to which the Agreement will relate are:

- the migration of customers from the Optus HFC network to the NBN
- layer 2 wholesale services supplied by NBN Co using the NBN
- voice, broadband and content services supplied by Optus (as a Retail Service Provider) to residential and small business customers using the Optus HFC network and the NBN
- Optus is likely to operate as a wholesaler/aggregator of NBN services.

- (d) The term for which authorisation of the provision of the contract, arrangement or understanding (whether proposed or actual) is being sought and grounds supporting this period of authorisation:

20 years. The grounds supporting this period of authorisation are set out in the submissions of NBN Co and Optus lodged in support of this application.

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

Other parties: Singtel Optus Pty Limited; Optus Networks Pty Limited; Optus Internet Pty Limited; Optus Vision Media Pty Limited.

Address of other parties: Building C, Level 4, 1-7 Lyonpark Road, Macquarie Park, NSW, 2113

Description of business carried on by other parties: The other parties currently operate the Optus HFC network and provide services to end users using that network.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)

N/A.

4. Public benefit claims

- (a) Arguments in support of application for authorisation:
(Refer to direction 6)

The public benefits are set out in detail in the NBN Co and Optus submissions lodged in support of this application.

In summary, those public benefits are as follows:

- The Agreement will result in the removal of inefficient infrastructure duplication, as well as other efficiency gains through cost savings.
- The Agreement facilitates the coordinated migration of Optus HFC customers to the NBN.
- The Agreement supports the Government's objective of achieving structural reform of the telecommunications industry in Australia and improving the availability of broadband across Australia.
- The Agreement supports the ability of NBN Co to roll out the NBN to achieve the service standards and coverage required by the Government.
- The Agreement will provide greater certainty about NBN Co's revenue, and will further increase the take-up of NBN service.
- The Agreement supports enhanced retail competition which has the potential to bring about significant benefits for consumers by providing a level playing field in downstream retail markets.

- The Agreement supports product development and innovation, as well as consumer take-up of next generation broadband services and applications.
- The Agreement supports the development of a vibrant wholesale market.
- The decommissioning of the Optus HFC network will lead to environmental benefits.

Please refer further to the NBN Co and Optus submissions.

(b) Facts and evidence relied upon in support of these claims:

The facts and evidence relied upon in support of these claims are set out in the NBN Co and Optus submissions lodged in support of this application and include:

- The Government's policy objectives.
- The Government's Statement of Expectations given to NBN Co dated 17 December 2010.
- NBN Co's Corporate Plan 2011-2013 dated 17 December 2010.
- The governance and operating framework for NBN Co, established by the National Broadband Network Companies Act 2011 and the Telecommunications Legislation Amendment (National Broadband Network Measures - Access Arrangements) Act 2011.
- Expert report prepared for NBN Co and Optus by Frontier Economics dated December 2011.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 7)

Wholesale and retail markets for the supply of fixed line telecommunications services, both within the HFC network serving area and nationally. See further the NBN Co and Optus submissions.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the contract arrangement or understanding for which authorisation is sought, in

particular the likely effect of the contract arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

For the reasons set out in the NBN Co and Optus submissions, the parties consider that no detriments to the public result or are likely to result from the Agreement.

- (b) Facts and evidence relevant to these detriments:

The relevant facts and evidence are set out in the submissions of NBN Co and Optus lodged in support of this application.

7. Contracts, arrangements or understandings in similar terms

- (a) This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:

- (b) Is this application to be so expressed?

No

- (c) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

N/A

- (ii) Where the parties to the similar term contract(s) are known — names, addresses and descriptions of business carried on by those other parties:

(Refer to direction 10)

N/A

- (iii) Where the parties to the similar term contract(s) are not known — description of the class of business carried on by those possible parties:

N/A

8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

N/A

- (c) If so, by whom or on whose behalf are those other applications being made?
N/A

9. Further information

- (a) Name, postal address and telephone contact details of the person authorised by the applicant seeking authorisation to provide additional information in relation to this application:

Caroline Lovell
Principal, Regulatory Affairs
NBN Co Limited
Level 11, 100 Arthur Street
North Sydney NSW 2060
Telephone: +61 2 9927 4147
Email: carolinelovell@nbnco.com.au

Dated 20TH JANUARY 2012.....

Signed ~~by~~/on behalf of the applicant

Caroline Lovell
.....
(Signature)

CAROLINE LOVELL
.....
(Full Name)

NBN CO LIMITED
.....
(Organisation)

PRINCIPAL, REGULATORY AFFAIRS.
.....
(Position in organisation)

DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing their application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which authorisation is sought.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.
 7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding in particular having regard to goods or services that may be

substitutes for the good or service that is the subject matter of the application for authorisation.

8. Provide details of the detriments to the public, including those resulting from any lessening of competition, which may result from the proposed contract, arrangement or understanding. Provide quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.
10. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, and descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.